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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

EXCISE APPEAL BRANCH

Appeal No. E/347&381 /2011 - EX[DB]
E/S/416/2011-EX

Date **24/02/2012**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S BHUSHAN STEEL LIMITED,
28/4, SITE-IV, SAHIBABAD INDUSTRIAL AREA,
SAHIBABAD, GHAZIABAD (U.P.)

M/S BHUSHAN STEEL LIMITED, Appellant

Vs

C.C.E. GHAZIABAD Respondent

STAY ORDER NO. 335/2012-EX

I am directed to transmit herewith a certified copy of **Final order No.A/215-216/ 2012 EX|DB|** dated 22-2-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

Copy to :

1. Respondent
C.C.E. GHAZIABAD
C.G. O. COMPLEX-II, KAMLA
NEHRU NAGAR, GHAZIABAD
201302

2. Adv. / Consult SH. RAJESH CHIBBER, ADV.,
C/O APPELLANTS,

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. M/S. BHUSHAN STEEL LTD.
28, SITE-IV, SAHIBABAD INDL. AREA,
SAHIBABAD

Assistant Registrar
(Excise Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI
Court No.III

Date of Hearing: 8.2.2012

For Approval and signature:

Hon'ble Mrs. Archana Wadhwa, Member Judicial
Hon'ble Mr.Mathew John, Technical Member

1.	Whether Press Reporters may be allowed to see The order for publication as per Rule 27 of the CESTAT(Procedure) Rules, 1982?	No
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) rules, 1982 for publication in any authoritative report or not?	No
3.	Whether their lordships wish to see the fair copy of the order?	Seen
4.	Whether order is to be circulated to the Department Authorities?	Yes

E/Stay No.416/2011 in E/Appeal No.347/2011

(Arising out of order in appeal No.232/CE/Gzb/2010 dated 29.10.2010 passed by the Commissioner of Customs & Central Excise(Appeals), Ghaziabad)

M/s Bhushan Steel Limited — Appellants

Vs

CCE, Ghaziabad — Respondent

E/Appeal No.381/2011

CCE, Ghaziabad — Appellants

Vs

M/s Bhushan Steel Limited — Respondent

Appeared for the Appellant: Shri Rajesh Chibber, Advocate
Appeared for the Respondent: Shri R.K. Verma , AR

Coram: **Hon'ble Mrs. Archana Wadhwa, Member(Judicial)**
Hon'ble Shri Mathew John, Member (Technical)

STAY ORDER No. 335/2012-EX (BR)
FINAL ORDER No. A/215-216/2012-EX (BR)

Per Archana Wadhwa:

After hearing both the sides duly represented by Shri Rajesh Chibber, learned Advocate for the appellants and Shri R.K. Verma, learned AR for the Revenue, we note that the Commissioner (Appeals) vide his impugned order has remanded the matter to the lower authorities for re-adjudication, after observing the principles of natural justice. As such, there is no confirmation of demand of duty against the appellant, thus making the stay petition infructuous. In fact, learned Advocate appearing for the Appellant submits that out of the total demand of Rs. 19,54,230/- and confirmed by the Superintendent, they have already deposited and amount of Rs. 8,13,805/-.

2. In view of the above, we dispose of the stay petition and proceed to decide both the appeals – one by the appellant and the other by the Revenue.

3. It is seen that the Superintendent vide his letter dated 25.5.2010 addressed to the appellants directed them to deposit an amount of Rs. 19,54,230/- by holding that though the appellant was paying differential duty in respect of factory gate invoices and depot sale invoices during the period November, 2003 to March, 2010 but on checking the statement, such payment of differential duty has been found to be on the lower side. Accordingly, he had directed the appellant to deposit the amount in question.

4. The said letter of the Superintendent was appealed against by the appellants before the Commissioner (Appeals). The Appellate Authority observed that the Revenue's plea that it was a case of default of correct payment of duty covered by Rule 8(3A) of Central Excise Rules, 2004 and does not require issuance of show cause notice cannot be accepted as held by Hon'ble Andhra Pradesh High Court in the case of Sanghi Polyester Ltd Vs CCE Hyderabad 2010 (251) ELT 504 (AP). As such, he observed that an opportunity of hearing is required to be given by way of issuance of show cause notice. As per the said judgment of Hon'ble High Court, even in such cases of default in payment of duty, the department is supposed to issue necessary show cause notice raising/confirming the demand of duty. Accordingly, he remanded the matter as under:-

"In the present case, the view point of the department is that since it is a case of default in correct payment of duty, it is covered by Rule 8(3A) of the Central Excise Rules, 2002 and there is no need to issue the show cause notice in such cases of default in payment of duty In this context, the Hon'ble High Court of Andhra Pradesh at Hyderabad's decision in the case of Sanghi Polyester |Ltd Vs Supdtt. of Central Excise, Hyderabad 2010 (251) ELT 504 9AP) as relied on the appellants involving a similar issue of demand of duty (issue of demand on account of alleged default in payment of duty in terms of Rule 8(3A) of the Central Excise Rules, 2002) is relevant, wherein the Hon'ble High Court discussing the relevant provisions of recovery of duty viz. Section 11A of the Central Excise Act, 1944 and sub-rule (3A) of Rule 8 of the Central Excise Rules, 2002 allowed the writ petition of the assessee (petitioner) holding that since the respondent (department) failed to follow the mandatory procedure prescribed under the statutory provision under which the petitioner is entitled to be given an opportunity of being heard by way of a show cause notice,

the petitioner is entitled to invoke this Court's jurisdiction under Article 226 of the Constitution of India without first availing the remedy of appeal. Thus as per the said judgement of the Hon'ble High Court, it has been held that even in such cases of default in payment of duty, the department is supposed to issue necessary show cause notice before raising/confirming the demand of duty. The present case stands covered by this judgement. In view of these facts, the decision of the Hon'ble CESTAT in the case of Calcom Visin Ltd Vs CCE Meerut I 2002 (142) ELT 3838 (Tri. Del) as relied on by the department is not relevant. In the light of the above facts and rulings/judgements, the matter deserves to be re-examined by the appropriate lower authorities."

5. The said order of Commissioner (Appeals) stands impugned before us by both the sides. The contention of the appellant is that the Commissioner (Appeals) has not clarified the direction to issue a fresh show cause notice and has only remanded the matter for fresh consideration. The adjudicating authority in remand proceedings, would decide the matter in terms of the above order of Commissioner (Appeals) without actually issuing the show cause notice. In such a case, the illegal proceedings would get converted into legal proceedings. As such, the lower authorities should be directed to issue a show cause notice to the appellants, which they would be entitled to challenge on merits as also on limitation. The Revenue's appeal is on the ground that the Commissioner (Appeals) has no power to remand and he should have decided the matter himself.

6. We have seen the original letter issued by the Superintendent which was the cause of appeal before the Commissioner (Appeals). We note that by the said letter, the appellants have been directed by

the Superintendent to make a deposit of the disputed amount of duty, by taking into consideration the assessable value as available at the factory gate and as available at depot sales and differential duty statement submitted by the appellant. The letter also refers to the methodology adopted by the appellants for payment of differential duty. Accordingly by the said letter, the practice adopted by the appellants for payment of differential duty is not appropriate and has resulted in short payment of duty. Thus it is clear that the disputed issue is not of admitted duty liability and also does not involve interpretation of Rule 8. The same is a result of dispute on correct quantification and payment of duty. Revenue in adopting different methodology for payment of differential duty in respect of the factory gate invoice and depot invoices. As such, the law requires the Revenue to issue a proper show cause notice to the appellants so as to give a chance to assessee to explain their view point and then to decide the same in accordance with law. Having not been issued any show cause notice, the appellants grievance on the point is proper and just. As such, we hold that before adjudicating the remanded proceedings, a proper show cause notice would be issued by the concerned officer raising the demand, disclosing the reason for the same along with legal provision etc. The appellant would be given an opportunity to put forth their defence and to cause appearance in person. Their appeal is disposed of in the above terms.

7. As regards, the Revenue's appeal, without going into the legal issue, as to whether the Commissioner (Appeals) has power or not, we find that as we have already directed the lower authority to re-

adjudicate the ~~mater~~ matter after proper observance of process of law, we hold that the impugned order of Commissioner (Appeals) remanding the matter is not to be set aside on the said ground. Accordingly, Revenue's appeal is rejected.

8. Stay petition as also both the appeals are disposed of in the above manner.

(Order dictated and pronounced in the open Court.)

(MATHEW JOHN)
Member (Technical)
MPS*

(ARCHANA WADHWA)
Member (Judicial)